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In the Supreme Court of the United States

October Term, 1928

INDIAN MOTOCYCLE COMPANY

v.

THE UNITED STATES OF AMERICA

ON CERTIORARI FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

(Supreme Printing Company, Inc.)

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ON CERTIFICATE FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The Court of Claims rendered no opinion.

JURISDICTION

The case is here on a question of law certified to this Court by the Court of Claims, pursuant to Section 3(a) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The question certified is as follows (R. 5):

> Question: Where a motor cycle is sold by a private corporation to a municipal corporation of a State and the purchase of said

motor cycle was authorized by said municipal corporation for police purposes, for which said motor cycle was at all times exclusively used, is said transaction within the provisions of Section 600, subdivision (2) of the Revenue Act of 1924 (43 Stat. 322) and the decision of the Supreme Court in the case of *Panhandle Oil Co.* v. *The State of Mississippi,* decided on May 14, 1928, 277 U. S. 218, and taxable thereunder?

While the question as certified does not state, and the record does not show, that the vendor was a manufacturer, producer, or importer, it must have been, because otherwise the transaction clearly would not be taxable under Section 600 of the Revenue Act of 1924. Moreover, the question as certified seems somewhat unfortunately expressed in asking whether the transaction is within the provisions of Section 600 *and* the decision in the *Panhandle Oil Co. case* "and taxable thereunder." The question which the Court of Claims intended to present was undoubtedly whether the transaction is within the provisions of Section 600 and taxable thereunder *notwithstanding* the decision in the *Panhandle Oil Co. case.*

THE STATUTE INVOLVED

The relevant section of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 322) is as follows:

SEC. 600. On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and

paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

* * * * *

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body.

A similar tax was imposed by Section 600 of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 316), Section 900 of the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1122), Section 900 of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 291), and Section 600 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 93).

REGULATIONS AND RULINGS

The first published regulation of the Treasury Department in relation to the taxation of articles sold to States or political subdivisions thereof, appeared on May 31, 1918, in Regulations 44, Article VII, as follows:

* * * Articles sold to a State or a political subdivision thereof for use in carrying on its governmental operations are not subject to the tax.

Following the passage of the Revenue Act of 1918, Regulations 47 (T. D. 2832) were published in May, 1919, and contained the following:

> ART. 10. *Sales to the Government or a State.*—* * * Articles sold to a State or a political subdivision thereof by the manufacturer for use in carrying on its governmental operations are not subject to the tax. Articles sold by a manufacturer to a State, county, or municipal institution are also exempt from tax when paid for entirely out of public money.

Following the publication of this regulation the Secretary of the Treasury requested an opinion from the Attorney General of the United States on the question whether or not the excise tax imposed by Section 900 of the Revenue Act of 1918 applied to sales of the enumerated articles to a State or political subdivision thereof. The Attorney General rendered an opinion which is reported in 31 Opinions of Attorneys General 520. This reads as follows:

> DEPARTMENT OF JUSTICE,
> *July 7, 1919.*
>
> SIR: I have the honor to acknowledge receipt of your letter of May 14, requesting my opinion upon the question whether the excise tax imposed by section 900 of the Revenue Act of February 24, 1919 (40 Stat. 1122), upon the manufacturer, producer, or importer upon the price for which articles enumerated in the section are sold, applies upon sales of

such taxable articles to a State or a political subdivision thereof.

Section 900 provides (40 Stat. 1122):

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—"

Then follow a number of subdivisions specifying various articles and the rate per centum of the tax levied thereon. Subdivision 10 of the section is as follows:

"Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;"

Section 903 (40 Stat. 1123) provides:

"That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the Commissioner, with the approval of the Secretary, may by regulations prescribe."

It is my opinion that this tax applies to sales to a State or a political subdivision

thereof, except those articles embraced by subdivision 10.

The exception contained in subdivision 10 indicates the congressional intent that the tax shall apply to the articles specified in the other subdivisions.

The United States, of course, can not tax the property or the instrumentalities of a State, but here the tax is not laid upon either the property or the instrumentalities of the State. If it reaches the State at all it does so only in an indirect manner. The tax is laid upon the manufacturer, and while it is probable that he will pass it on to the consumer, the tax itself is not laid upon the consumer. The burden, therefore, if it falls upon the State, does so indirectly. Such an incidental and indirect effect results from the payment of all taxes, and while this tax may be traced more directly into the cost to the State, yet the fact remains that it is an incidental and indirect burden upon the State and not the taxation of either its property or its instrumentalities. *Snyder* v. *Bettman*, 190 U. S. 249; *Baltic Mining Company* v. *Massachusetts*, 231 U. S. 68; *Kansas City, Fort Scott & Memphis Railway Company* v. *Kansas*, 240 U. S. 227; *The American Manufacturing Company* v. *The City of St. Louis*, decided by the Supreme Court on June 9.

Respectfully,

A. MITCHELL PALMER.

To the SECRETARY OF THE TREASURY.

As a result of this opinion of the Attorney General, on July 22, 1919, Treasury Decision 2897 was

issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. This decision amended Article 10 of Regulations 47 under the Revenue Act of 1918 to read as follows:

> ART. 10. *Sales to the Government or a State.*—* * * The tax also applies to the articles enumerated in this section, except to those enumerated under subdivision (10), when sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations.

This provision was also contained in the revision of Regulations 47 under the 1918 Act in December, 1920 (T. D. 3132), and similar provisions were contained in revisions of January, 1922 (T. D. 3278), August, 1924 (T. D. 3630), and May, 1926 (T. D. 3862), under the 1921, 1924, and 1926 Acts. The provision under the 1924 Act, which is the one directly involved in the present case, is as follows:

> ART. 10. *Sales to the Government or a State.*—The tax applies to articles enumerated in section 600, except those enumerated under subdivision 6 (see Art. 19), when sold to the United States Government. The same is true of articles sold to a State or political subdivision thereof, even though they are to be paid for entirely out of public moneys and are to be used in the carrying on of governmental operations. * * *

STATEMENT

The case was heard by the Court of Claims on an agreed statement of facts. (R. 2.) The Indian Motocycle Company, a Massachusetts corporation, on or about June 16, 1925, sold a motorcycle to the City of Westfield, Massachusetts. The total amount paid by the City of Westfield was $290.33, of which $13.83 appeared on the invoice as "amount of tax." (R. 2.) This $13.83 was five per cent of the price of the motorcycle.

The motorcycle was purchased by the City of Westfield for police purposes, and was used at all times exclusively for those purposes. (R. 3.)

The Commissioner of Internal Revenue assessed a tax of $13.83 against the plaintiff company under the provisions of Subdivision 2 of Section 600 of the Revenue Act of 1924, which tax the plaintiff paid. (R. 3.) Subsequently the plaintiff filed a claim for refund, setting out as a ground therefor that (R. 3):

> * * * the regulations making taxable sales of motorcycles to municipalities for use in performing their governmental functions are invalid and in contravention of the Federal Constitution.

The claim was disallowed by the Commissioner of Internal Revenue (R. 3, 4), and the plaintiff brought this suit to recover $13.83 with interest. (R. 6–10.)

ARGUMENT

While the amount sued for in the present case is only $13.83, the question here involved is important, and a decision that the sale of the motor cycle to the City of Westfield was not taxable may require the refund of large sums of money collected as taxes. Since 1919 the Regulations of the Treasury Department have provided that articles sold to a State or political subdivision thereof are subject to tax. The Court of Claims has certified that there is a division of the court and that the court is in doubt. Under these circumstances we have felt justified in not asking the Court of Claims to withdraw its certificate, although we believe that the present case is not distinguishable from the *Panhandle Oil Co. case* and that the plaintiff in the present case is therefore entitled to recover. It is true that the tax imposed by Section 600 of the Revenue Act of 1924 is a tax upon the vendor (*Lash's Products Co.* v. *United States*, 278 U. S. 175), but so also were the taxes involved in the *Panhandle Oil Co. case.*

In the *Panhandle Oil Co. case* the taxes held to be invalid were State taxes imposed upon dealers in gasoline and measured by sales to the United States, while in the present case the tax is a Federal tax imposed upon a vendor and measured by a sale to a political subdivision of a State, but there can be no doubt that the right of the States and their political subdivisions to have their transactions untrammeled by Federal taxation is as broad as the

right of the Federal Government to have its transactions untrammeled by State taxation. The tax involved in the *Panhandle Oil Co. case* was imposed upon "any person engaged in the business of distributing gasoline, or retail dealer in gasoline," while in the present case the tax is imposed upon "articles sold or leased by the manufacturer, producer, or importer." But whether the tax is measured by the final sale to the ultimate consumer or the initial sale by the manufacturer, producer, or importer seems to furnish no ground for distinction so long as the sale by which the tax is to be measured is to the United States or a State or political subdivision thereof, as the case may be.

CONCLUSION

We believe that the present case is governed by the decision of this Court in the *Panhandle Oil Co. case* and that the answer to the question certified by the Court of Claims is that the transaction here involved is not taxable under Section 600 of the Revenue Act of 1924.

WILLIAM D. MITCHELL,
Attorney General.

ALFRED A. WHEAT,
GARDNER P. LLOYD,
Special Assistants to the Attorney General.

APRIL, 1929.